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in the

Supreme Court

of the

United States

October Term, 1984

No. 84-

DOUGLAS CHARLES DuFRESNE,
Petitioner,

vs.

BENJAMIN BAER, Chairman, United States Parole Commission, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the prohibition contained in the *ex post facto* clause of Article One, Section Nine of the United States Constitution applies to the parole guidelines of the United States Parole Commission, where different parole guidelines were adopted after a crime had been committed and were retrospectively applied to the detriment of the offender?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Douglas Charles DuFresne (pronounced Due-Frain), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered October 29, 1984; Petition for Rehearing before the original panel denied November 30, 1984.

OPINIONS BELOW

The Order of the Magistrate of the United States District Court for the Northern District of Florida, dated February 24, 1982, is set forth in the Appendix at page App. 1. The Magistrate's Order granted the Petitioner's Application for Writ of Habeas Corpus by conclusively finding that the United States Parole Commission, through the retrospective application of its parole guidelines in the Petitioner's case, had violated the Constitutional prohibition against *ex post facto* laws[1].

The Order and Memorandum Decision of the Judge of the United States District Court for the Northern District of Florida, dated August 4, 1982, is set forth in the Appendix at page App. 7. This Order reversed the previous Order of the Magistrate by concluding that the United States Parole Commission's guidelines cannot violate the *ex post facto* clause, even if applied retrospectively, and remanded the case to the Magistrate with directions to enter an Order dismissing with prejudice the Petitioner's Application for Writ of Habeas Corpus.

[1]United States Constitution Article One, Section Nine, Clause Three.

The Order and Judgment of the Magistrate of the United States District Court for the Northern District of Florida, dated August 9, 1982, is set forth in the Appendix at page App. 18-19. This Magistrate's Order, in compliance with the District Court Judge's Order, dismissed with prejudice the Petitioner's Application for Writ of Habeas Corpus.

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the Order of dismissal *(DuFresne v. Baer* 744 F.2d 1543 (11th Cir. 1984) is set forth in the Appendix at page App. 20.

JURISDICTION

The decision of the Court of Appeals for the Eleventh Circuit was entered on October 29, 1984. A timely Petition for Rehearing was denied on November 30, 1984 and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition contained in the *ex post facto* clause of Article One, Section Nine of the United States Constitution applies to the parole guidelines of the United States Parole Commission, where different parole guidelines were adopted after a crime had been committed and were retrospectively applied to the detriment of the offender?

CONSTITUTIONAL PROVISIONS INVOLVED

Article One, Section Nine, Clause Three of the Constitution of the United States:

"(n)o...ex post facto law shall be passed."

STATEMENT OF THE CASE

The Petitioner, Douglas Charles DuFresne, was formerly a senior pilot for Pan American Airlines, regularly flying commercial jetliners on overseas routes which included stopovers at Tehran, Iran. During the period of time when civil unrest and opposition to the Shah began to destabilize the economy of that country, the Petitioner arranged to personally import eight (8) pounds of raw opium into the United States from Iran. Given the courtesy which United States Customs extended to a senior Pan Am pilot, this "mule with wings" simply carried these drugs through customs in an unchecked valise. In 1979 a federal grand jury in the Western District of Texas indicted the Petitioner on three (3) counts for Conspiracy To Import Opium, Possession With Intent To Distribute Opium, and Conspiracy To Import Cocaine[2]. The Indictment correctly alleged that the Petitioner had committed these acts during a one (1) year period from March of 1978 to March of 1979.

Pursuant to a plea agreement, the Petitioner pled guilty to the third count of the Indictment on September 17, 1979, and on the government's motion the District Court then dismissed the first two (2) counts of the Indictment. The Petitioner was given an eight (8) year prison sentence, originally structured under 18 U.S.C. 4205(a), which meant that the Petitioner would become eligible for parole only after serving one-third (1/3) of his eight (8) year term[3]. However, on January 14, 1980 the

[2]United States v. DuFresne, et al., No. SA-79-CF-72 (W.D. Tex.).
[3]18 U.S.C. § 4205(a) (1982) provides in pertinent part:

> "Whenever confined and serving a definite term or terms of more that one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years..."

sentencing Court granted the Petitioner's Motion[4] to modify the sentence and structured it under 18 U.S.C. 4205(b)(2), which meant that the Petitioner became eligible for parole at any time at the discretion of the United States Parole Commission[5].

The Petitioner was given his initial parole hearing on May 21, 1980 at the Federal Prison Camp, Eglin Air Force Base, Florida. However, between the time of the offense behavior (March 1978 - March 1979) and the date of this initial parole hearing (May 21, 1980) the United States Parole Commission had changed both the parole guideline rating as well as the very basis on which the Petitioner's drug offense would be classified.[6]

At the time of the Petitioner's offense behavior, drug offenses were rated on the basis of the street value of the drugs possessed, ascertained by either the actual street sales price or, if no sale had taken place, a theoretical street sales price as determined by the Drug Enforcement Administration. Thus, under the parole guidelines in effect at the time of the crime, since the Petitioner's drugs had a street value of less than $100,000.00, his crime would have been classified in the "Very High" offense severity rating. This "Very High" offense severity rating, when combined with the Petitioner's first offender salient factor score of eleven (11), yielded a parole guideline range specifying incarceration for a

[4]Per Federal Rules of Criminal Procedure Rule 35.

[5]18 U.S.C. §4205(b)(2) (1982) provides in pertinent part:

> "Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine."

[6]44 Federal Register 26540-48 (May 4, 1979), guideline rating effective June 4, 1979.

term of between twenty-six to thirty-six months (26-36 months).

However, by the time of the Petitioner's initial parole hearing (May 21, 1980) the new parole guidelines effective June 4, 1979 had changed the basis by which drug offenses were to be evaluated. This new basis considers only the quanity and purity of the drugs possessed and the possessor's interest therein (i.e., whether managerial or non-managerial, proprietary or nonproprietary). Under these newly promulgated parole guidelines, the severity rating of the Petitioner's offense behavior was escalated to the "Greatest I" category, a severity rating only surpassed by the "Greatest II" rating reserved for the most heinous crimes, such as premeditated murder and air piracy.[7] This was accomplished by finding that the Petitioner had possessed a managerial interest in more that fifty (50) grams of 100% pure opiate, with no regard to the street value of the drugs whatsoever. Per the newly promulgated parole guidelines, this "Greatest I" offense severity rating, combined with the Petitioner's salient factor score of eleven (11), yielded a parole guideline range which specified incarceration for a term of between forty to fifty-two months (40-52 months). The United States Parole Commission, acting through the Southeast Regional Commissioner, originally set the Petitioner's required incarcerated term at fifty-two (52) months, a decision later modified to a presumptive parole after required service of forty-six (46) months.

The Petitioner first exhausted his administrative remedies by both Regional and then National Parole Appeals. The National Parole Appeals Board affirmed the Regional Commissioner's decision and the Petitioner thereupon sought habeas corpus relief in the United States District Court for the Northern District of Florida.

[7]See 28 C.F.R. 2.20 (1979).

The Petitioner's sole complaint was that the United States Parole Commission, by applying substantially different parole guidelines promulgated after the dates of the offense behavior, had retroactively enhanced the punishment for his crime, thereby violating the *ex post facto* prohibition of Article One, Section Nine, Clause Three, of the United States Constitution. In his application for habeas corpus relief, the Petitioner sought an Order requiring the United States Parole Commission to give him a presumptive parole date within the time frame specified by the guidelines which were in effect at the time the crime was committed.

All parties originally consented to the trial of the case before a U. S. Magistrate.[8] The Magistrate agreed with the Petitioner and granted the relief requested.[9] On appeal, the District Court Judge reversed, concluding that the United States Parole Commission's guidelines cannot violate the *ex post facto* clause, even if applied retrospectively, and remanded the case to the Magistrate with directions to enter an Order dismissing the case with prejudice.[10] The Magistrate so complied[11] and on appeal the United States Court of Appeals for the Eleventh Circuit affirmed the Order of dismissal.[12] A timely Petition for Rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on November 30, 1984.

[8]See 28 U.S.C. 636(c) (1982).

[9]Magistrate's Order set forth in the Appendix at page App. 1.

[10]District Court Judge's Order set forth in the Appendix at page App. 7.

[11]Magistrate's Order and Judgment set forth in the Appendix at page App. 18-19.

[12]DuFresne v. Baer, 744 F.2d 1543 (11th Cir. 1984) set forth in the Appendix at page App. 20.

REASONS FOR GRANTING THE WRIT

I.
THE VARIOUS UNITED STATES COURTS OF APPEAL ARE CURRENTLY IN DIRECT CONFLICT OVER THE SOLE ISSUE WHICH THIS CASE PRESENTS, TO-WIT: THE APPLICATION OF THE EX POST FACTO CLAUSE TO THE UNITED STATES PAROLE COMMISSION'S GUIDELINES.

The Petitioner, formerly a senior pilot for Pan American Airlines, knows more than most the vagaries and varieties of geography. His case history, in fact, is a testimonial to his travelling nature. He walked the drugs through Customs in one region of this country (New York), was indicted in another region (Texas), and incarcerated in yet another region (Florida). Yet, at least in this last respect,his case is not unusual, for many a federal prisioner is currently incarcerated in what has been classified as an appropriate penal institution albeit far from the geographic place in the United States where the crime occurred or the conviction was handed down. It is this very mobility, the easy and continuous flow of federal prisoners from one state or region to another, which makes the current conflict between the various United States Courts of Appeal all the more untenable, for institutional location is presently the single most determinative factor when seeking federal habeas corpus relief for the claimed *ex post facto* application of United States Parole Commission's guidelines. Literally, were the Petitioner to have been incarcerated in a different Federal Prison Camp (e.g. Allenwood Federal Prison Camp, Montgomery, Pennsylvania, where an appeal would have gone before the Third Circuit Court of Appeals), seeking this writ in his case would have been unnecessary. This anomaly of conflict between the various United States Courts of Appeal is one which only the Supreme Court can rectify. The present disparity of

treatment on a purely geographical basis is clear, substantial, and wholly unwarranted.

The central and controlling issue may be simply stated: Do the United States Parole Commission's Guidelines have the force and effect of law, such that a retrospective application of them may constitute a violation of the *ex post facto* clause? The United States Courts of Appeal for the Third, Eighth, and District of Columbia Circuits have answered this question in the affirmative.[13] Meanwhile, the Second, Sixth, Seventh, Ninth and (with the case at bar) Eleventh Circuits have now stated that United States Parole Commission's Guidelines do not and cannot have the force and effect of law.[14] These two lines of cases are in direct and irreconcilable conflict with each other. Federal prisoners in some areas of the United States are accorded the full protection of the *ex post facto* clause against retrospective application of the United States Parole Commission's guidelines which have a detrimental impact upon them, while in other geographic areas identically situated federal prisoners are told that these same guidelines are merely discretionary and therefore are not "laws" within the province and proscription of the *ex post facto* clause. Only a decision by this Honorable Court can resolve the conflict and assure uniformity throughout the entire United States.

The current conflict between the various Circuits is further aggravated by the fact that oftentimes a single federal prisoner is moved through a series of facilities as

[13] *United States v. Ferri*, 625 F.2d 325 (3rd Cir. 1981); *Geraghty v. U. S. Parole Commission*, 579 F.2d 238 (3rd Cir. 1978); *Richardson v. U. S. Parole Commission*, 729 F.2d 1154 (8th Cir. 1984); *Pickus v. U. S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).

[14] *Shephard v. Taylor*, 556 F.2d 648 2d Cir. 1977); *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977); *Zeidman v. U. S. Parole Commission*, 593 F.2d 806 (7th Cir. 1979); *Rifai v. U. S. Parole Commission*, 586 F.2d 695 (9th Cir. 1978); and now *DuFresne v. Baer*, 744 F.2d 1543 (11th Cir. 1984).

his custody classification, behavior, and immediately pending parole may warrant. A single prisoner may, for example, begin his incarcerated term in a Federal Correctional Institution, be transferred to a Federal Prison Camp, and finally be placed in a Federal Community Treatment Center immediately prior to his release on parole. Currently, if these transfers between facilities cross Circuit lines, the same prisoner on the same issue may have a valid habeas corpus claim on some days but not others merely depending upon his physical location. Moreover, it frequently happens that a federal prisoner is moved from his regularly assigned institution to a new situs where he is to be questioned by authorities or testify in a court proceeding. Again, his right to habeas corpus relief may currently be predicted upon just such a temporary transfer.

In 1976, when Congress passed the Parole Commission and Reorganization Act,[15] the United States Parole Commission was instructed to carry out a "national parole policy"[16] and to promulgate guidelines for the express purpose of promoting "a more consistent exercise of discretion".[17] From the outset the clear intent of Congress was to eliminate the unwarranted disparity between parole considerations involving similarly situated federal prisoners. Yet, that clear intent is presently being thwarted in certain cases, such as that of the Petitioner, where the conflict between the various Circuit Courts of Appeal has created a two-tone patchwork quilt of disparity across a map of the United States.

In the past, this Honorable Court has not hesitated to remove uncertainty and eliminate unwarranted disparity where a clear conflict has existed amongst the

[15]Act of March 15, 1976, Pub. L. No. 94-233, 1976 U.S. Code Cong. & Ad. News (90 Stat.) 219 (codified in various sections of 18 U.S.C. (1976)).

[16]18 U.S.C. 4203(a)(1) (1982).

[17]28 C.F.R. 2.20 (1979).

United States Courts of Appeal for the various Circuits. The present situation warrants the same remedial attention.

II

ONLY THE SUPREME COURT IS QUALIFIED TO FINALLY DETERMINE WHETHER THE UNITED STATES PAROLE COMMISSION'S GUIDELINES ARE "LAWS" WITHIN THE SCOPE OF THE EX POST FACTO CLAUSE.

The various United States Courts of Appeal which have considered *ex post facto* claims involving retrospective use of later promulgated United States Parole Commission guidelines have been in unanimous agreement that the determinative question is whether or not these guidelines have the force and effect of law.

The character of law in our modern bureaucratic nation is not always easy to ascertain. As Chief Judge Boyle of Rhode Island wrote only this last year:

> "Rights are not only subject to specific acts of the legislature, but also to those of its delegates or alter egos, in the persons of administrative bodies. Today law is generally the law which may impinge most directly upon individual rights."[18]

Perhaps this is not an unexpected modern dilemma for this Honorable Court recognized the same issue over fifty (50) years ago when discussing the *ex post facto* clause as related to "laws, whatever their form".[19] Thus, while it is true that no legislature promulgated the present parole

[18] *Lerner v. Gill*, 580 F. Supp. 1056 at 1060 (D.R.I. 1984).
[19] *Beazell v. Ohio*, 269 U.S. 167 (1925).

guidelines, certain Circuit Courts of Appeal have held them to be "laws" and as such, capable of working to the detriment of those persons against whom they were retrospectivly applied.

At the core of evaluating the United States Parole Commission's guidelines as possible "laws", there lies the question of discretion. In the case at bar, the Eleventh Circuit Court emphasized the retained discretion of the United States Parole Commission in concluding that the guidelines were not law, "rather, they are stated policy rules that show how agency discretion is likely to be exercised".[20] The court then went on to quote the Sixth Circuit's similar conclusion in the case of *Ruip v. United States*, 555 F.2d at 1335:

> "These guidelines are not law, but guideposts which assist the Parole Commission...in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not filed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines."[21]

However, other Courts have been equally clear in finding that the guidelines have fettered discretionary power such that parole determinations have not remained discretionary acts. To quote from the Third Circuit Court in the case of *Geraghty v. U. S. Parole Commission*, 579 F.2d at 267:

> "The freedom of the Commission to grant parole prior to the customary release date is constrained...It thus appears that the 'channel for discretion' provided by the guidelines is in fact an unyielding conduit."[22]

[20]Appendix, at page App. 35.
[21]Appendix, at page App. 36.
[22]*GERAGHTY, supra.*

This same sentiment was expressed by the District of Columbia Circuit Court over a dozen years ago:

> "...the rules which define parole selection criteria, new and old, are substantive agency action, for they define a fairly tight framework to circumscribe the Board's statutorily broad power...they are self imposed controls over the manner and circumstances in which the agency will exercise its plenary power. They have the effect of law..."[23]

As can be seen from even these few quotations the nebulous nature of "laws", as applied to agency action such as the United States Parole Commission's guidelines, is such that only this Honorable Court is qualified to provide a determinative answer, thereby terminating the current disparity between the treatment of federal prisoners in the various Circuits.

III

THE ISSUE AT BAR IS NOT MOOT AS TO THE PETITIONER

On April 10, 1982, the Petitioner was paroled "under protest" by the United States Parole Commission in compliance with the Magistrate's Order of February 24, 1982.[24] However, on August 4, 1982, the District Court Judge reversed the Magistrate,[25] a decision which would have mandated additional incarcerated service by the Petitioner. The Petitioner thereupon filed a Motion To Stay Pending Appeal, which was granted by the Magistrate on September 10, 1982. The Petitioner was released on bail September 17, 1982 and has remained on

[23] *PICKUS, supra,* 507 F.2d at 1113, footnote 13.
[24] Appendix, at page App. 1.
[25] Appendix, at page App. 7.

bail to the present date.

In granting Certiorari, this Honorable Court would be determining whether or not the Petitioner need serve the additional term of incarcerated service representing the difference between the guidelines in effect at the time the Petitioner committed the offense behavior and those differing and more stringent guidelines in effect at the time of the Petitioner's parole hearing.

CONCLUSION

This Honorable Court is the only proper forum for resolving the current direct conflict between the various United States Courts of Appeal as concerns the application of the *ex post facto* clause to the United States Parole Commission's guidelines. The current disparity between federal prisoners, based solely upon the geographic location of their incarceration facility, is both untenable and unwarranted, as is the ludicrous present scenario wherein even a single prisoner may at various times and locales be entitled to habeas corpus relief, a right then subject to termination when he crosses a state line in an involuntary transfer between federal facilities. Only a decision by this Honorable Court can finally determine whether the United States Parole Commission's guidelines are "laws", a determination upon which any *ex post facto* consideration must hinge.

The Supreme Court should grant this Petition for Writ of Certiorari in order to satisfy the urgent need to end such disparity between the treatment of federal prisoners as concerns their parole determinations under the current decisions of the various United States Courts of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U. S. Mail this 19th day of February 1985, to Rockne Chickinell, Attorney for the U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland, 20815 and to Samuel A. Alter, Jr., Assistant U.S. Attorney, 307 U.S. Courthouse, 100 North Palafox Street, Pensacola, Florida 32501.

ALLEN R. SMITH